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ATTORNEY FOR APPELLANT:

THOMAS C. ALLEN
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY L. WARD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A04-0603-CR-115

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0411-FB-184

October 5, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Jeffery L. Ward appeals from his convictions for Criminal Confinement,¹ a class B felony, and Battery Causing Serious Bodily Injury,² a class C felony. In particular, Ward argues that his convictions run afoul of double jeopardy principles because the same serious bodily injury was used to enhance both crimes. Additionally, he argues that there is insufficient evidence supporting his convictions. Finding that Ward's convictions violate the Double Jeopardy clause of the Indiana Constitution and finding no other error, we affirm in part, reverse in part, and remand with instructions to vacate the class C felony battery conviction, enter a judgment of conviction for battery as a class A misdemeanor, and amend the sentencing order to reflect a one-year concurrent sentence for the battery conviction.

FACTS

On November 6, 2004, Ward went to the Allen County apartment of his friend, Vacilia Jimenez, and demanded money and the keys to her apartment. When Jimenez refused, Ward yelled at her and ransacked the apartment. Jimenez left her apartment and stood in the hallway on the lower level of the building. Ward followed her, struck her in the head with his fist, and choked her with both hands until she fell to the floor. Jimenez's neighbor heard the commotion and ran into the hallway to stop the attack.

The neighbor told Ward to remove his hands from Jimenez's neck and then shoved Ward off of Jimenez. At that point, Ward fled from the building. Jimenez lost consciousness

¹ Ind. Code § 35-42-3-3.

² I.C. § 35-42-2-1.

and was later awakened by a passerby. After identifying and locating Ward, police officers arrested him following the attack.

On November 12, 2004, the State charged Ward with class B felony criminal confinement, class C felony stalking, class C felony battery causing serious bodily injury, class D felony intimidation, and class A misdemeanor battery. On October 4 and 5, 2005, the State dismissed all charges except for criminal confinement and class C felony battery. Following a trial, on October 5, 2005, a jury found Ward guilty of the remaining charges. On November 4, 2005, the trial court sentenced Ward to ten years for criminal confinement and to four years for battery, with the sentences to be served concurrently. Ward now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Ward first argues that his convictions for class B felony criminal confinement and class C felony battery are impermissible because both crimes were enhanced based upon the same serious bodily injury. Consequently, Ward argues, the dual convictions violate the Double Jeopardy clause.

In Pierce v. State, our Supreme Court considered whether a defendant's convictions for class A felony burglary and class B felony robbery ran afoul of double jeopardy principles where both crimes were enhanced by the same bodily injury. 761 N.E.2d 826, 829-30 (Ind. 2002). The court noted that, while there was no impermissible overlap of the respective elements of the crimes, "we have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not

governed by the constitutional test set forth in Richardson.” Id. at 830 (citing Richardson v. State, 717 N.E.2d 32, 55 (Ind. 1999)). The Pierce court concluded that the dual convictions were impermissible and announced a rule that “two crimes may not be enhanced by the same bodily injury.” Miller v. State, 790 N.E.2d 437, 439 (Ind. 2003) (applying Pierce); see also Holloway v. State, 773 N.E.2d 315, 319 (Ind. Ct. App. 2002) (holding that same injurious conduct by defendant could not be used to enhance criminal deviate conduct and rape convictions to class A felonies).

Criminal confinement is a class D felony unless it results in serious bodily injury to the victim, in which case it is enhanced to a class B felony. I.C. § 35-42-3-3. Battery that results in bodily injury to another person is a class A misdemeanor unless, among other things, it results in serious bodily injury to another person, in which case it is enhanced to a class C felony. I.C. § 35-42-2-1. “Serious bodily injury” means, among other things, bodily injury that causes unconsciousness. Ind. Code § 35-41-1-25(2).

Here, the State supported the enhanced charges against Ward with a single serious bodily injury—Ward’s choking of Jimenez that caused her to lose consciousness. Pursuant to Pierce, the same conduct resulting in the same serious bodily injury should not have been used to enhance both charges. Thus, the battery conviction should have been entered as a class A misdemeanor,³ and we must remand this cause for vacation of the battery conviction

³ Ward concedes that there is evidence supporting a conviction of class A misdemeanor battery because he caused bodily injury to Jimenez when he struck her head with his fist. Appellant’s Br. p. 8. As an aside, we observe that if the State had presented evidence that when Ward struck Jimenez he caused her to suffer extreme pain, his conviction for class C felony battery may have been proper. This is so because bodily injury causing extreme pain is “serious bodily injury” warranting an enhanced charge, I.C. § 35-41-1-25(3),

as a class C felony, entry of judgment of conviction for battery as a class A misdemeanor, and imposition of a one-year⁴ concurrent sentence for the battery conviction.

II. Sufficiency of the Evidence

Ward next argues that there is insufficient evidence supporting his conviction for class B felony criminal confinement.⁵ In particular, he contends that there is insufficient evidence establishing that his actions caused serious bodily injury to Jimenez. As noted above, to prove that element of the crime, the State was required to prove that Ward caused bodily injury to Jimenez that resulted in a loss of consciousness. I.C. §§ 35-41-1-25(2), 35-42-3-3.

Here, the record reveals that Jimenez told a police officer that after Ward began choking her, the next thing she remembered was a passerby shaking her to wake her up. Tr. p. 129. Additionally, Jimenez's neighbor told the police at the scene that Jimenez had lost consciousness, that Jimenez's "eyes rolled in the back of her head," and that the neighbor "had to shake her" to try to wake her up. Tr. p. 157. Ward emphasizes that at trial, the neighbor testified that she had observed Jimenez "losing conscious[ness]," versus her statement to police that Jimenez had actually lost consciousness. Id. This variation, however, does not render the evidence insufficient, inasmuch as it is the factfinder's

and because this conduct and resulting injury are separate from and independent of Ward's act of choking Jimenez until she became unconscious. But the State presented no such evidence. Consequently, we cannot find the convictions to be proper on this basis.

⁴ Indiana Code section 35-50-3-2 provides that a person convicted of a class A misdemeanor "shall be imprisoned for a fixed term of no more than one (1) year; in addition, he may be fined for not more than five thousand dollars (\$5,000)."

⁵ Inasmuch as we have reduced Ward's battery conviction to a class A misdemeanor, we need not consider this argument with respect to that count.

responsibility to resolve any inconsistencies in a witness's testimony and to decide what to believe and disbelieve. Cohen v. State, 714 N.E.2d 1168, 1180 (Ind. Ct. App. 1999). Ward's argument is merely an invitation for us to reweigh the evidence and judge the credibility of a witness—an invitation we decline. Consequently, we conclude that the evidence is sufficient to support Ward's conviction for class B felony criminal confinement.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate the class C felony battery conviction, enter a judgment of conviction for battery as a class A misdemeanor, and amend the sentencing order to reflect a one-year concurrent sentence for the battery conviction.

VAIDIK, J., and CRONE, J., concur.